72-85.

No.

Supreme Court, U. S.
FILED
JUL 15 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Robert Quintana

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No.

ROBERT QUINTANA, Petitioner

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Robert Quintana, your Petitioner, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on March 31, 1972, affirming the United States District Court for the District of Colorado's decision wherein the Petitioner was convicted of using extortionate means to collect an extension of credit, in violation of 18 U.S.C. § 894.

OPINIONS BELOW

No formal opinion was delivered by the United States District Court for the District of Colorado wherein the Petitioner was convicted by jury trial on July 7, 1971, of a violation of 18 U.S.C. § 894.

The opinion of the United States Court of Appeals for the Tenth Circuit entered on March 31, 1972 (Appendix A, Infra.) has not yet been officially reported.

DATE OF JUDGMENT AND TIME OF ENTRY

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on March 31, 1972.

Petition for Rehearing was denied by the United States Court of Appeals for the Tenth Circuit on May 26, 1972 (Appendix B, infra.).

On June 9, 1972, an order was issued from the Supreme Court of the United States by the Honorable Justice Byron R. White extending the time for Petitioner to file his Petition for Writ of Certiorari to and including July 15, 1972.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether consensual-participant monitoring of telephone conversations by one party thereto, when such party initiates phone calls and may in fact be acting as a police agent, done without prior judicial authorization and without a lawful warrant over a long period of time constitutes such a violation of the guarantees of the right of privacy of the Fourth Amendment and the warrant policy therein contained, or whether such a policy so violates constitutional standards as to raise a substantial federal question and a question of due process requiring the exercise of the supervisory powers of this Court.

2. Whether the circumstances and manner in which demands for payment of the debt were made by Petitioner and statements made in conversations initiated by the alleged victim constituted implicit or explicit threats of violence or simply innocent words indicating a failure on the part of the prosecution to sustain its burden of proof rendering the evidence insufficient to support the verdict; and, therefore, whether the condoning of this practice by the affirmation of the guilty verdict of the Petitioner herein has deprived the Petitioner of due process of law by so departing from the standards of justice as to require an exercise of this Court's power of supervision.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 894
18 U.S.C. § 2511
Fourth Amendment to the United States Constitution.

See Appendix C, infra.

CONCISE STATEMENT OF THE CASE

Petitioner, Robert Quintana, was convicted on July 7, 1971, of engaging in the use of extortionate means to collect an extension of credit from Ronald Wright, in violation of Title 18, U.S.C. § 894.

The conviction was returned by a jury verdict after a trial consisting primarily of the testimony of Ronald Wright relating to the alleged "extortionate means" which were allegedly performed towards him by the Petitioner in an effort to secure the repayment of two extensions of credit totaling the amount of $500.00. (T. 41-127). Coinciding with the testimony of Wright, certain tapes of telephone conversations between the Petitioner and Wright were played to the jury. It was undisputed as a matter of evidence or law that no warrant had been issued by any court for this electronic surveillance, or for the transcription of the telephone conversations between Ron Wright and Robert Quintana. Although the government contended that the tapes were obtained with the permission of the complaining witness, Ron Wright, the record contains no clear indication as to the nature of the witness's consent or the means whereby it was obtained from him (T. 28). Unknown to Petitioner, this surveillance occurred over a period of three months, continuing from October, 1970, through January 25, 1971 (T. 29). Not only were the conversations taped by the witness Wright, but he was assisted in doing so by Detective Rich T. McNamee, who overheard some of the alleged conversations between Wright and the Petitioner (T. 5-32; 128-134; and 152-163).

The contents of the telephonic communications were admitted into evidence over Petitioner's strong objection. The government attempted to introduce transcripts of alleged communications between Wright and another co-defendant, but was unsuccessful in so doing. (T. 83). Testimony was also given to alleged conversations which took place between Wright and the Petitioner in a personal meeting at Azar's Restaurant in Denver, Colorado. This meeting took place on December 15, 1970, and contains the most damaging testimony against the Petitioner. Wright testified to wearing a body transmitter which was communicating the text of the conversation to a receiver being manned by Detective McNamee some distance from the restaurant (T. 76-77; 107-108; 128-134 and 152-163). The actual transcription of this personal meeting was not introduced into evidence because the words were too garbled to make clear sense therefrom (T. 154-155). At the meeting at Azar's Restaurant, the only clear statement indicating even a potential

threat was not, in fact, made by the Petitioner herein, but rather, was made by the witness himself at his own initiative.

Taking the entire context of the verbal testimony and transcribed testimony offered at trial pertaining to conversations between the Petitioner and Ron Wright, one finds only that loans had been made by the Petitioner to Ron Wright at the request of Wright himself, and having been procured by a mutual friend of the two parties, Jim Clapes, a former employer of Wright. These loans were for a total of $500.00, and virtually no payment had been made thereon by the witness Ron Wright over a period of a number of months. No testimony was ever offered to indicate that Wright was physically harmed or threatened in any way, and, moreover, to the contrary, it appears that the Petitioner was almost conciliatory in his attitude towards collection of the debt from Wright in that he understood his difficult financial situation and, in fact, attempted to assist him in every way possible.

No testimony was given pertaining to an explicit threat, nor an implicit threat in that the alleged victim's state of mind was never clearly revealed to the jury, yet, on the basis of the testimony of the witnesses, and the presentation of the transcribed conversations, the jury found the Petitioner, Robert Quintana, guilty of the use of extortionate means to collect an extension of credit.

REASONS FOR GRANTING THE WRIT

1. THE PETITIONER'S CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION HAVE BEEN VIOLATED.

A substantial portion of the evidence presented in the trial of the Petitioner for a violation of 18 U.S.C. § 894 consisted of tape recordings of telephone conversations between the Petitioner and Wright and the playing and reading of these transcribed conversations to the jury. It is undisputed by the parties that no prior judicial authorization, namely a valid warrant, was obtained for the electronic surveillance of the telephonic conversations. (T. 20) Petitioner argues that the electronic recording of his telephone conversations with Wright initiated both by himself and by Wright constitutes a search and seizure and violated his Fourth Amendment rights. In a series of cases, the United States Supreme Court has consistently held that electronic surveillance and recordation by wire tapping is a search and seizure governed by the Fourth Amendment. Silverman v. United States, 365 U.S. 505 (1961); Katz v. United

States, 389 U.S. 347 (1967); Alderman v. United States, 394 U.S. 165 (1969); Giordano v. United States, 394 U.S. 310 (1969) and Taglianetti v. United States, 394 U.S. 316 (1969).

Although the government may argue that the method of recording the conversations was reasonable under the Fourth Amendment, it is clearly a question of weighing the competing interests involved. The Fourth Amendment prohibits "unreasonable" searches and seizures without a warrant. The interests to balance in determining the reasonableness of a search are those of the Petitioner's right of privacy and expectation of conducting private conversations on the telephone as compared to the invasion of personal rights resulting from the detection of crime. One should, however, also look to history, current experience and the modern setting to determine the reasonableness of the question in Petitioner's case. Except in certain very carefully defined cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant. Camara v. Municipal Court, 387 U.S. 523,528-29 (1967). The clear purpose of the warrant requirements of the Fourth Amendment is to have prior judicial sanction on the actions of police and police agents – not retroactive validation. Nothing in the Petitioner's case has imposed the consideration of an impartial, detached, neutral magistrate, but, rather, only the actions of the police officers involved and of Wright serve as the basis of reasonableness of the search and seizure.

Clearly searches conducted without warrants have been held unlawful notwithstanding facts unquestionably showing probably cause, Agnello v. United States, 269 U.S. 20, 33 (1925), for the constitution requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police. . ." Wong Sun v. United States, 371 U.S. 471, 481–482 (1963). The warrant requirement itself is not to be lightly regarded for the mandate of the Fourth Amendment requires adherence to judicial processes and ". . . the burden is on those seeking [an] exemption from the requirement to show the need for it . . ." United States v. Jeffers, 342 U.S. 48, 41 (1951); Chimel v. California, 395 U.S. 752 (1969); Vale v. Louisiana, 399 U.S. 30, 34 (1969).

Historically, the warrant requirement prohibits general searches and unreasonable searches and seizures and led to this policy which is so firmly established in the United States Court system. Lasson, The History and Development of the Fourth Amendment to the United States Constitution, 42-50 (1937).

The requirement of prior judicial authorization is not subject to an exception when viewed with respect to the facts of Petitioner's case. This was not a search incident to an arrest within the doctrine of Chimel v. California, supra; nor is this a "stop and frisk" case fitting the doctrines of Terry v. Ohio, 392 U.S. 1 (1968) or Davis v. Mississippi, 394 U.S. 721 (1969); neither does the case fit within the "hot pursuit" exception of Warden v. Hayden, 387 U.S. 294, 298-300 (1967).

Although the government may wish to argue that the overhearing of a telephone conversation involves a lesser invasion of privacy than a physical search of a man's home or his person, and that it is unreasonable to impose a warrant requirement in this situation where the party speaking could later himself testify or write down his memory of the conversation, Petitioner contends that typically electronic surveillance involves much more than a mere telephone conversation and is a dangerous and intrusive threat to privacy. An ominous foreboding of the danger was given by Mr. Justice Brandeis in Olmstead v. United States, 277 U.S. 438, 473 (1928) wherein he stated that:

> "Discovery and investigations have made it possible for the government, by means far more effective than stretching on the rack to obtain and disclose in court what is whispered in the closet."

Such electronic devices as a recorder hooked upon a telephone deeply and malignantly discourage people from speaking freely. Mr. Justice Brennan warned that if these devices and the use of them proliferated one might find himself in a society where the only sure way to guard against invasion and to protect one's privacy would be "to keep one's mouth shut on all occasions". Lopez v. United States, 373 U.S. 427, 450 (1963). Thus, one can point to the holding in Berger v. New York, 388 U.S. 41, 63 (1967) as authority for the proposition asserted by the Petitioner pointing to the dangerous use of unauthorized electronic surveillance. In Berger, it was stated:

> "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices."

In the most recent case dealing with electronic surveillance, United States v. United States District Court for the Eastern District of Michigan, ___ U.S.___, (decided June___, 1972), a distinction argued by the government was rejected differentiating between searches for intelligence purposes, and those for law enforcement and prosecution. The Court held that the dangers of unauthorized electronic surveillance on dissident groups possibly constituting a threat to the security of the

United States was a dangerous evil overstepping the bounds of the Fourth Amendment. The Petitioner argues there is little distinction between his case and that asserted in Berger, supra, Katz, supra, and of the general holdings that a warrant should be imposed wherever possible to authorize electronic surveillance.

Great stress has been laid by the government on older cases, specifically On Lee v. United States, 343 U.S. 747 (1952) and Lopez v. United States, supra, allowing the bugging of an informer and contemporaneous transmission of conversations between a defendant and such an informer without violating the doctrines of the Fourth Amendment. This issue has never been clearly settled by this Court either in the past or in the recent cases, including United States v. White, 401 U.S. 745 (1971). The typical rationale was based upon a risk-analysis theory that a person communicating with another bore the liability that such person might later communicate the context of that conversation to another, or that such person might, in fact, turn out to be a government agent. However, when a person is using a telephone on less than a face-to-face level, with the expectation of privacy such as those enumerated in Katz, supra, the situation becomes clearly distinguishable. Moreover, one must continually note the risk of the ever-expanding use of electronic surveillance and weigh this danger within the context of this risk theory.

One should note the admonition of Mr. Justice Brennan in Lopez, supra, at 465-466 wherein he stated the philosophy of Katz, supra, which was thereafter adopted:

> "... The risk of being overheard by an eavesdropper, or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak. But, as soon as electronic surveillance comes into play, the risk changes crucially. There is no security from that kind of eavesdropping, no way of mitigating the risk, and not even a residuum of true privacy ...
>
> "... Electronic aids add a whole new dimension to eavesdropping. They make it more penetrating, more indiscriminate, truly obnoxious to a free society. Electronic surveillance in fact, makes police omnipotent; and police omniscience is one of the most effective tools of tyranny."

In Justice Douglas' dissent to United States v. White, supra, not only does he explain that the majority in that decision failed to realize the true impact of On Lee and Lopez, as the product of a pre-Berger and pre-Katz era in which common law questions of trespass dictated the scope and extent of Fourth Amendment electronic surveillance questions. But, specifically, Mr. Justice Douglas states:

"The threads of thought running through our recent decisions are that these extensive intrusions into privacy made by electronic surveillance make self-restraint by law enforcement officials an inadequate protection, that the requirement of warrants under the Fourth Amendment is essential to a free society." (401 U.S. at 761-762)

Mr. Justice Brennan in his concurring opinion in United States v. White, supra, indicated his belief that the conclusions of Lopez and On Lee were also no longer sound law. He states:

"... In other words, it is my view that current Fourth Amendment jurisprudence interposes a warrant requirement not only in cases of third part electronic monitoring, (the situation in On Lee and in this case) but also in cases of electronic recording by a government agent of a face-to-face conversation with a criminal suspect, which as the situation in Lopez. ..."

Katz v. United States, 389 U.S. 347 (1967) adopted that 'doctrinal basis' and thus, it seems to me, agreed with the argument in the Lopez dissent that 'subsequent decisions and subsequent experience have sapped whatever vitality (On Lee) may once have had; that is should now be regarded as overruled' and that the situation in Lopez 'is rationally indistinguishable' 373 U.S. at 447...

It suffices to say that for both reasons, I remain of the view that the Fourth Amendment imposes the warrant requirement in both the On Lee and Lopez situations." 401 U.S. 755-756.

The substantiality of the question of whether electronic surveillance of the nature of that used in the Petitioner's case is lawful should mandate a clear dictation of policy from this Court. In the Petitioner's case one must also note that Wright himself may well have become a police agent in the manner in which he acted. It appears that once Wright went to the police complaining of the phone calls from the Petitioner, that not only is one unclear as to how his permission may have been obtained to record his end of the phone calls, but, moreover, he may well have been subtly convinced to do so by the police officers. The direct participation of Detective McNamee and others in establishing and running the tape recorder shows the

extent of the danger of such use of electronic surveillance without prior judicial supervision. The record indicates that as a result of conversations with the officer, permission was given to record phone calls at the address of Wright (T. 6). The fact that officers remained present in Wright's home during many of the recorded telephone conversations indicates his role (Wright's) was more than that of a consenting party to a telephone conversation. In addition, the alleged victim Wright himself initiated the phone calls to the Petitioner which were recorded and allowed to be admitted into evidence before the jury. Condoning such a practice by failing to overturn the decision and alalyze the dangers of electronic surveillance in these informer-participant monitoring situations creates ab initio the danger that investigative officers of police agencies can skirt the warrant requirements simply by ferreting out willing informers who agree to allow recordation of their conversations. Viewing the facts in Petitioner's case where the electronic surveillance continued over a period lasting three months or longer one becomes especially suspicious of such activities.

There may have been probable cause in the situation involving the Petitioner whereby officers might have obtained valid judicial authorization for a warrant enabling a lawful use of electronic surveillance. Yet they purposely failed to do so and skirted the Fourth Amendment mandate of protection against unreasonable invasions of privacy. Moreover, the dictates of statutory law have been clearly violated by such activities. As, for e.g., set forth in 47 U.S.C. § 605, it is unlawful for one to intercept the wire or oral communication without the consent of the *sender*. Although the decision in Rathbun v. United States, 355 U.S. 107 (1957) might indicate to the government that such an interception of a telephone message did not violate § 605 of the Federal Communications Act, that case is clearly distinguishable from the case involving the Petitioner in that police agents overhearing the conversation on the telephone listened on a regular telephone extension in another room of the consenting party's home. This extension was not installed for that special purpose, but had been regularly and normally used in that manner. The case did not deal with electronic surveillance, but dealt with the admission allowed of the testimony of the overhearing officers. Even if Rathbun, supra, is controlling law, there is another statutory policy clearly violated by the electronic surveillance of the Petitioner's activities.

18 U.S.C. § 2511 prohibits the interception and disclosure of wire or oral communications by any investigation or law enforcement officer (18 U.S.C. § 2510 (7)) where such person is not acting under color of law (18 U.S.C. § 2511 (2) (c).) The Petitioner's situation may fit within the exception of § 2511 (2) (d), but this exception must be carefully weighed by the Petitioner's argument. First, there is a grandiose question as to the nature of the consent of Wright: moreover, even if he (Wright) lawfully gave his consent, there is some question as to the admissibility of the transcription of said communications in that the statute speaks only to the interception of the communication and not to the transcription and recordation of such; moreover, Wright may well have been acting in a capacity of an agent of the police, and, finally, the overwhelming policy of the Fourth Amendment must be considered within the context of the facts of this case. The unlawful nature of the agent's activities in Petitioner's case as emphasized and amplified by the specific prohibition against interception of wire or oral communication by law enforcement officers under 18 U.S.C. § 2516 (1) (f) (which unmistakably requires prior authorization from a court of competent jurisdiction for an interception dealing with an offense involving extortionate credit transactions under § 894 of Title 18 U.S.C.) must be carefully scrutinized.

The importance of the warrant requirement madates, pursuant to this statutory policy as expressed, supra, and considered where there was no danger and where communications extended over a lengthy period of time as in Petitioner's case, that the interposition of a neutral and detached magistrate be and should have been made an absolute prerequisite for the activities of Wright and the officers involved.

Condoning such activities by failing to express a clear mandate in the use of electronic surveillance activities on the part of investigative forces and informers endangers the rights of privacy and freedom of speech possessed by each individual American. It is time that a clear constitutional policy be set forth delineating the boundaries of such activities and placing specific safeguards of the rights and remedies so sacredly enjoyed, at least in theory, by each American living under the Constitution of the United States of America. Petitioner asserts that is is incumbent upon this Court to review the policies of the case cited supra in the interests of federal law, constitutional law, and social policy.

II. PETITIONER'S CONVICTION VIOLATES THE FUNDAMENTAL DUE PROCESS GUARANTEES OF THE CONSTITUTION.

Factually the evidence must be viewed in the light most favorable to the government. Glasser v. United States, 315 U.S. 60, (1942). Under the standards of the statute which the Petitioner allegedly violated, even so viewing the evidence, the government failed to sustain its burden of proof and the evidence presented was insufficient to support a conviction of the Petitioner herein.

Petitioner was convicted of a violation of 18 U.S.C. § 894. That statute requires that one use "extortionate means" to collect an "extension of credit". The particular question to be answered is whether the Petitioner's conduct constituted such an extortionate means which satisfies the definition of an "extortionate means" as explicitly set forth in 18 U.S.C. § 891 (7). Noting the specificity of this statute, it is clear that combined with 18 U.S.C. § 894, that a threat involving violence or criminal means is a fundamental requisite to constitute an offense under the statute. Cases involving extortionate credit transactions point to the definition of Carbo v. United States, 314 F. 2d. 718, 740-741 (9th Cir. 1963) for the proper basis of the definition of extortion. Carbo, supra, specifically requires that:

> "In cases of extortion based upon fear of violence, the facts of fear, actual or anticipated, and of its reasonableness are vital factors. To prove a substantive act of extortion, it is essential to show the generation of fear in the victim: . . ."

(See also cases cited in footnote 33, Carbo, supra, at 740-741)

In United States v. Curcio, 310 F. Supp. 351, 357 (D.C. Conn., 1970), the court, in discussing the use of implicit threats under 18 U.S.C. § 891 and 894, stated:

> "Facts or statements constitute implicit threats only if they instill fear in the person to whom they are directed, or are reasonably calculated to do so in light of the surrounding circumstances, and there is intent on the part of the person who performs the act or makes the statement to instill fear. See United States v. Tropiano, 418 F.2d. 1069, 1081 (2nd Cir. 1969), cert. denied, 397 U.S. 1021, 1970."

Noting that the purpose of Title 2 of the Consumer Credit Protection Act of 1968 and amended Title 18 U.S.C. dealing with "extortionate credit transactions", 18 U.S.C. § 891-96, was, according to the legislative history, a far-reaching attempt to control "the vicious billion dollar a year loan-sharking racket", 114 Cong. Rec. 14384 (1968), and "a deliberate legislative attack on the economic foundations of organized crime" Conf. Rp. No. 1397, 90th Congress, 2nd Session, 1968, U.S. Code Cong. & Admin. News, Pages 20-29. There has been no connection drawn to the Petitioner herein in any facets or organized crime or of an organized loan-sharking racket. Thus, not only does the conviction violate the policy behind the statute under which the Petitioner has been convicted, but also, there has been absolutely no indication as to the mental understanding of any comments made by the Petitioner to the alleged victim Wright indicating a fear instilled in his mind such as could constitute an implicit threat satisfying the statute as explained supra.

In the first telephone conversation between the alleged victim, Ron Wright, and Robert Quintana, the Petitioner herein, occurring some time in October of 1970, Ron Wright testified that at this point the Petitioner told him to get caught up in his payments and stated "I don't want to have to send somebody around. See what you can do." (T. 57). Other indicia of an alleged threat relied upon by the prosecution in the trial of the Petitioner (T. 103-104) indicate no testimony given by Wright as to his mental state of belief following the conversation with the Petitioner herein. Without such belief, the test of Carbo, supra, has not been satisfied, nor can the allegation of an implicit threat still stand. Moreover, one should note the conciliatory attitude of the Petitioner herein towards Wright in seeking repayment of a long overdue debt which the victim Wright repeatedly refused or failed to pay or make payments upon. (T. 101, and Plaintiff's Exhibit 4).

The only real question left in doubt concerns the conversation taking place in Azar's between Petitioner and Wright, but which factually is confused and irresponsible evidence to support conviction due to the discrepancies in testimony as to what was actually said and occurred. (T. 77, 101, 130-132, 158-159).

Thus, the evidence shows only that the Petitioner made repeated demands for payment of a debt owed him by Wright. (T. 109-117). To sustain the conviction of the Petitioner under the provisions of 18 U.S.C. § 891(7) and § 894 would, in effect be: a misreading of the wording of the statute; a violation of the rule requiring strict construction of criminal statutes; and condones the conviction of the Petitioner without adequate evidence to sustain the burden of proof requiring a showing of guilt beyond all reasonable doubt, so as to have denied Petitioner his guarantees to due process of the law as provided by the United States Constitution, Fifth and Fourteenth Amendments.

CONCLUSION

Of the Constitutional safeguards provided each and every American, one of the most fundamental is the Fourth Amendment's protection against unreasonable searches and seizures and the right to privacy guaranteed therein. In our modern setting where indiscriminate and uncontrolled surveillance of activities of individuals from Senators, Congressmen, and Governors, down the lowest possible suspect has severely departed from the warrant requirement provided in the Fourth Amendment. Such activities must be carefully analyzed.

Based upon the nature of the facts in Petitioner's case the rationality of participant monitoring of telephone conversations without prior judicial authorization falls into question. The impact on Petitioner's Constitutional guarantees of due process and protection against invasions of privacy are placed in jeopardy by the facts and circumstances herein involved. The importance of these questions presented requires an exercise of the supervisory powers of this Court.

APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MARCH TERM, 1972

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

No. 71-1585

ROBERT QUINTANA,
Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 71-CR-140)

Richard J. Spelts, Assistant United States Attorney (James L. Treece, United States Attorney, and Milton C. Branch, Assistant United States Attorney, on the brief for Plaintiff-Appellee.

Jay L. Gueck for Defendant-Appellant.

Before HILL, BARRETT and DOYLE, Circuit Judges.
DOYLE, Circuit Judge.

This appeal is from a jury verdict finding defendant-appellant Robert Quintana guilty of using extortionate means to collect an extension of credit, in violation of 18 U.S.C. § 894. A judgment of acquittal was entered in behalf of codefendant Edward Quintana for insufficiency of the evidence against him.[1] The challenge on this appeal is to the sufficiency of the evidence supporting the jury's verdict against Robert Quintana; secondly, the court's ruling admitting tape recordings of telephone conversations between appellant and Wright, the alleged victim of the extortion; thirdly, the court's refusal to grant to the defendant-appellant discovery of Grand Jury minutes and testimony of witnesses who appeared before the Grand Jury. We have reviewed the contentions and we conclude that they are lacking in merit, whereby we affirm the conviction.

The statute under which appellant was convicted prohibits knowing participation in the use of extortionate means to attempt the collection of a debt.[2] "Extortionate means" is defined as:

> . . . [A]ny means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person. 18 U.S.C. § 891(7).

1. This judgment resulted from inability of the witness to identify his voice on the phone.

2. 18 U.S.C. § 894 provides in pertinent part:

> (a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means
>
> (1) to collect or to attempt to collect any extension of credit, or
>
> (2) to punish any person for the nonrepayment thereof,
>
> shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.
>
> * * *

The evidence against appellant consisted primarily of the testimony of Ronald Wright, a tape recording which contained eight telephone conversations between Wright and appellant, and Wright's testimony regarding another conversation between him and a person he thought was Edward Quintana. The tape was played to the jury with certain portions deleted as a result of an order by the court.

In the summer of 1970 Wright borrowed from Robert Quintana, in two loans, the sum of $500.00. The rate of interest was $5.00 per $100.00 per week, or a total of $25.00 per week. There was not any specified date or time period for payment of the principal. Interest payments were the important part of the transaction. The loans had been arranged by Wright's employer, Jimmy Clapes, who was personally acquainted with Robert Quintana.

For the first month and a half, from July until mid-August, the interest payments were deducted by the employer from Wright's car allowance and paid directly to Robert Quintana. After Wright terminated this employment in mid-August, interest payments were made directly to Robert Quintana at the latter's home until the first week in October of 1970. He testified to paying some "six or seven hundred dollars." This amount did not, of course, include any payments on the principal.

The interest payments were not always delivered on time or in the full amount, and Wright testified to receiving telephone calls from Quintana reminding him of the accumulated obligation. In at least one of these calls, Robert Quintana advised Wright to become current because "I don't want to send somebody around to collect it." The same message was repeated in early October just after Wright ceased to make payments. Soon thereafter, Robert Quintana called again to say that he would be out of town and that his brother Edward Quintana would be in touch with him regarding the loans.

Following this last communication Wright called the office of the Denver District Attorney (State) and reported what had happened. After conferring with officers of the Organized Crime Unit, Wright agreed to have a tape recorder attached to his telephone at home. There were transcriptions of two conversations, October 31 and November 6, between Wright and Edward Quintana. The court rejected these, but at the same time allowed Wright to testify, and he did so without objection. The reason for rejection of the transcripts was the fact that the tapes had become erased, and the transcripts were ruled out by the trial court on the ground that they were not the best evidence. At the same time, the court allowed Wright to testify as to the conversation had on November 6. Previously, on

October 31, a person thought to be Edward Quintana had called up and said "This is Robert's brother" and had told him to drop some money off at Robert's house. The same voice was identified by Wright as the one who called on November 6. Wright testified that on this latter occasion the caller made a threat of violence.[3]

From November 21, 1970 to January 11, 1971 Robert Quintana made eight phone calls which were admitted into evidence and played to the jury. Quotations from one of these conversations is shown so as to indicate their substance and tone.[4]

The reference to "these guys" and the undertone as to what they might do pervades the entire transcript of the telephone calls.[5] There was, in addition, testimony relating to a December 12 meeting at Azar's Restaurant between Wright and Quintana. Wright said that he asked appellant "what would happen if I didn't pay." Quintana was said to have responded that "We would work you over and every time we saw you we would work you over." Wright was wearing a body microphone, and this conversation was transmitted to investigators stationed outside the restaurant, but a recording made of it was not introduced into evidence, apparently due to the fact that large portions had been garbled and were indistinct.

3. According to Wright this conversation was direct and to the point:
"THE WITNESS: He said, 'What do I have to do, come by your house over on 33d or 32d or wherever it is and beat your fucking head in?' I believe that's what he said, to my knowledge."

4. * * *
"Q Well, Ron, I'm gonna have to have some – uh – or else they told me to go up there and talk to ya and try to get somethin', and try to get that money in. They just can't stand it no more, Ron. Two months, I mean, you didn't even try to make ten dollars, fifteen dollars, anything, you know.

Well, I just don't have it. You know, I paid back an awful lot, Robert."

* * *

"Look, Ron, I don't even give a damn if you even pay the vigorish (interest). Just get the money in here cause that's what I want, that's what they're mad about.

R Who's mad atcha?

Q The guys I got it from – Mertz and them – they ain't gonna stand for that shit – uh – Ron.

R I don't even know those guys.

Q (Inaudible) well, I'll tell you why – you don't wanna know Mertz. And then if Mike gets on ya, that's another one.

R Oh, that's your brother.

Q Yeah. So is Mertz my brother, you know that.

• • •

"Q Well, Ron, I, I, I just can't just keep tellin' those guys this. Now one of them I know is gonna want to go up there tonight.

R Well, if he comes up I don't know what good it's gonna do him.

Q Well, Ron, you better think twice, I'm tellin' ya. I mean I'm just tellin' ya for your own good. You know you can't screw these guys around like that, you know that, They didn't ask you to take their money, you called and took their money. And when you do that, Ron, you're responsible to pay it back. You knew what you was in for.

R What do you – what do you suggest I do?

Q Well, Ron, at least give 'em somethin' so you can keep 'em quiet, don't you understand what I'm tryin' to tell ya?"

Telephone call between Ronald Wright and Robert Quintana of December 12, 1970 (emphasis added).

5. For example, the following excerpt from the January 11, 1971 conversation where Quintana invokes the name of Jimmy Clapes, Wright's former employer:

"Q Well – Ron, now look, I told you now a long time, it's over a month and a half ago – I said you've gotta mke some kind of arrangement, I don't care what it is, you gotta make it. And now you just ignore it, Ron. Then there's nothin' else I can do, I can't keep these guys on my back. So I – there's only one alternative, and that's to go after Jimmy. Now, if that don't work there's gonna hafta be somethin' done."

I.

In challenging the insufficiency of the evidence to support the verdict, appellant argues that he did not threaten physical violence; that on the contrary he sought to convince Wright by friendly persuasion to make his payments so as to protect him from violence at the hands of others. He, in effect then, says that the means he used to collect the debt were legitimate and that he was not therefore guilty of using any extortionate means. The evidence heretofore summarized does show, with one exception (the conversation at Azar's which was not recorded, but which was related by Wright), persuasion of a sort. However, the persuasion is transparent and the threat of dire violent consequences flowing from Wright's failure to pay is present, and as noted toward the end there was no effort to veil the threat. Moreover, there were the threats of Edward Quintana, who was commissioned by defendant to enforce the payments for an interim period, and this particular incident left nothing to the imagination. The general nature of the total transaction was such as to render this threat a clear incident of the general operation and, thus, to be within scope of the authority granted. Hence the defendant was accountable for this statement of his agent.[6]

In summary then the total record fully supports the allegation that extortionate means were used in an attempt to collect an extension of credit. We are mindful, of course, that the background circumstances, namely the extremely high interest rate, plus the never ending payments, support fully this conclusion.

6. See 22 C.J.S. § 84 at 246, Commission of Crime by Agent, wherein it is said at page 247-48:

> A principal may, however, be liable for the criminal act of his agent under certain circumstances, as where the principal, with the requisite criminal intent, actually procures, hires, incites, encourages, authorizes, or directs another to commit such criminal act or consents to the commission of the act by an agent . . . .

See also United States v. Food and Grocery Bureau of So. Cal., 43 F. Supp. 966, 971 (U.S.D.C., S–D–Calif. 1942). Cf. Empire Printing Company v. Roden, 247 F.2d 8, 17 (9th Cir. 1957). See also IV Wigmore on Evidence § 1078 at 126.

II.

Appellant urges us to find that the tape recordings were made in violation of the Fourth Amendment and thus were inadmissible. The issue, of course, is whether a telephone tape constitutes an unreasonable search and seizure and thus violates the Fourth Amendment when one party consents but the other party has no knowledge of the phone tap and thus believes the conversation is private.

In Holt v. United States, 404 F.2d 914, 919 (10th Cir. 1968) this court interpreted the Supreme Court's decision in Katz v. United States, 389 U.S. 347 (1968), as not applying when an informant has consented to the eavesdropping. United States v. White, 401 U.S. 745 (1971) supports this evaluation of Katz. Also, the more recent rulings by other circuits reflect the same viewpoint. See, e.g., United States v. Puchi, 441 F.2d 697 (9th Cir. 1971); United States v. Skillman, 442- F.2d 542 (8th Cir. 1971); United States v. Caracci, 446 F.2d 173 (5th Cir. 1971). And it makes no difference which party initiated the call. See United States v. Puchi, supra. We do not distinguish between calls initiated by Quintana and those commenced by Wright. The decisions in White and Holt do not call for this. The significant factor is that of the consenting party; hence a search warrant was not necessary. The tape recordings were admissible, as well as the agents' recollections of the conversations they overheard.

III.

The trial court denied a motion for pretrial discovery of the Grand Jury proceedings, including the minutes and the testimony of government witnesses. Appellant had no right to view these materials before trial, 18 U.S.C. § 3500 (1970), and, indeed, the transcript of Wright's testimony before the Grand Jury was furnished to appellant's counsel at the noon recess before the completion of direct examination. The tape recordings of the phone calls were made available to appellant's counsel before trial. Finally, the material sought to be discovered with regard to the Grand Jury proceedings was not testimony of the defendant which is discoverable under Federal Rule of Criminal Procedure 16. Prior to the 1970 amendment to 18 U.S.C. § 3500, the decision whether to disclose Grand Jury testimony was committed to the sound discretion of the trial court on the showing of a particularized need. Dennis v. United States, 384 U.S. 855 (1965); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959); United States v. Fuentes, 432 F.2d 405, 408 (5th Cir. 1970). No abuse is apparent here even applying this standard.

The judgment is affirmed.

APPENDIX B

MAY TERM – MAY 16, 1971

Before Honorable David T. Lewis, Chief Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

No. 71-1585

ROBERT QUINTANA,
Defendant-Appellant.

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the appellant in the captioned case.

Upon consideration thereof, the petition for rehearing is denied by Circuit Judges Hill, Barrett and Doyle to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the petition for rehearing en banc is denied.

HOWARD K. PHILLIPS

APPENDIX C

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED:

18 U.S.C. § 894. Collection of extensions of credit by extortionate means

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) To collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b) (1) or the circumstances described in section 892(b) (2) , and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

18 U.S.C. § 2511; in pertinent part:

"(1) Except as otherwise specifically provided in this chapter any person who–

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication:

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when– . . . .

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; . . . .

* * * *

(2) (c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(2) (d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

Fourth Amendment to the Constitution of the United States:

"AMENDMENT IV – SEARCHES AND SEIZURES
The right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describint the place to be searched, and the persons or things to be seized."